

## Interlocal Terms and Conditions for the Transfer of Development Rights

### Draft Rule – Chapter 365-198 WAC

May 24, 2010

#### NEW SECTION

##### **WAC 365-198-010 Authority and Purpose**

- (1) Chapter 43.362 RCW establishes a regional transfer of development rights program in central Puget Sound, including King, Pierce, Kitsap, and Snohomish Counties and the cities and towns within these counties. A transfer of development rights program is a market-based exchange mechanism that encourages the voluntary transfer of development rights from sending areas that a community wants to conserve to receiving areas where growth and the infrastructure to support growth are planned. Participation in the regional transfer of development rights program by counties, cities and towns is optional.
- (2) The purpose of this chapter is to make it easy to transfer development rights from counties to cities and towns in the regional transfer of development rights program. The purpose of the regional transfer of development rights program is to conserve resource, rural and other land prioritized for conservation consistent with RCW 43.362.040 and county transfer of development right programs, and to encourage growth in cities and towns consistent with the state growth management act under chapter 36.70A RCW.
- (3) The purpose of this chapter is to adopt by rule terms and conditions of an interlocal agreement for transfers of development rights between counties, cities, and towns. Counties, cities, and towns participating in the regional transfer of development rights program have the option of adopting the terms and conditions by reference to transfer development rights across jurisdictional boundaries as an alternative to entering into an interlocal agreement under chapter [39.34](#) RCW. If a city or county chooses to adopt the terms and conditions provided in this rule, nothing in this chapter prohibits the city or county from adopting additional terms and conditions in the adopting ordinance or resolution.
- (4) This chapter shall be deemed to provide an alternative method to an interlocal agreement for transferring development rights between a county and city or town under the regional transfer of development rights program, and shall not be construed as imposing any additional condition upon the exercise of any other powers vested in counties, cities and towns. Nothing in this chapter prohibits a county, city, or town from entering into an interlocal agreement under chapter [39.34](#) RCW to transfer development rights under the regional program.

#### NEW SECTION

##### **WAC 365-198-020 Applicability**

- (1) This chapter applies to transfers of development rights between King, Pierce, Kitsap and Snohomish Counties and the cities and towns within these counties. This chapter only applies to transfers from county-designated sending areas consistent with RCW 43.362.040 to city or town-designated receiving areas. Transfers of development rights may be between any county and any city or town within the four-county region. A transferring county shall consult in good faith with the county in which a city is located in regards to transfers of development rights between counties and cities, and the subsequent designated receiving area and receiving area ratio in the city or town.
- (2) Utilization of this chapter for transfers of development rights between King, Pierce, Kitsap and Snohomish Counties and the cities and towns within these counties is optional.
- (3) Prior to using this chapter for transfers of development rights, a county must adopt transfer of development rights policies or regulations that designate sending areas consistent with RCW 43.362.040 and procedures to implement the regional transfer of development rights program.
- (4) Prior to using this chapter for receiving development rights, a city or town must adopt policies or regulations that designate receiving areas and state the receiving area ratio or ratios for rights to be received.
- (5) The terms and conditions that are adopted by reference by a city or town in sections 4 and 6 are not binding on the city or town unless the transferring county has also adopted required language in sections 5 and 6 by reference. Conversely, the terms and conditions that are adopted by reference by a transferring county in sections 5 and 6 are not binding on the county unless the receiving city or town has also adopted required language in sections 4 and 6 by reference.

#### NEW SECTION

#### **WAC 365-198-030 Definitions**

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Department" means the department of commerce.
- (2) "Development rights credit" means the tradable good representing development rights. Development rights credits are purchased and sold, either on the open market or through a transfer of development rights bank. For sending site landowners, credits are assigned and certified by the transferring county based on the number of development rights assigned to their property pursuant to the county's transfer of development rights program. For developers, credits are based on the receiving area ratio.
- (3) "Receiving area ratio" means the number or character of development rights that are assigned to a development right for use in a receiving area. Development rights in a receiving area may be used at the discretion of the receiving area jurisdiction, including but not limited to

additional residential density, additional building height, additional commercial floor area, or to meet regulatory requirements. The receiving area jurisdiction exercises its discretion regarding the use of development rights when it adopts policies or regulations to allow the use of development rights.

(4) "Receiving areas" are lands within and designated by a city or town in which transferable development rights from the regional transfer of development rights program established by this chapter and certified by the transferring county may be used.

(5) "Receiving cities and towns" mean the cities and towns that have chosen to participate in the regional transfer of development rights program by receiving development rights pursuant to RCW 43.362.060.

(6) "Regional transfer of development rights program" means the regional transfer of development rights program established by RCW [43.362.030](#) in central Puget Sound, including King, Pierce, Kitsap, and Snohomish Counties and the cities and towns within these counties.

(7) "Sending area" includes those lands designated by the county as sending areas from which transferable development rights can be sold, and that meet conservation criteria as described in RCW [43.362.040](#) as follows:

- (a) Land designated as agricultural or forest land of long-term commercial significance;
- (b) Land designated rural that is being farmed or managed for forestry;
- (c) Land whose conservation meets other state and regionally adopted priorities; and
- (d) Land that is in current use as a manufactured/mobile home park as defined in chapter [59.20](#) RCW.

(8) "Sending area ratio" means the number of development rights that a sending area landowner can sell per the transferring county's transfer of development rights program.

(9) "Transfer of development rights" includes methods for protecting land from development by voluntarily removing the development rights from a sending area and transferring them to a receiving area for the purpose of increasing development density or intensity in the receiving area.

(10) "Transfer of development rights bank" means an entity operated by a county or other public agency or private organization for the purpose of buying, selling, and holding

development rights or facilitating private development right transactions between landowners and developers.

(11) "Transferable development right" means a right to develop one or more residential units, including fractions of residential units, in sending areas that have been certified by the transferring county, and can be sold and transferred for use consistent with:

(a) A transferring county's adopted program and the regional transfer of development rights program; and

(b) A receiving ratio adopted by the city or town for development in a designated receiving area.

(12) "Transferring county" means the county that has agreed to participate in the regional transfer of development rights program pursuant to RCW 42.362.060.

#### NEW SECTION

#### **WAC 365-198-040 Terms and conditions for cities and towns**

- (1) Cities and towns that choose to use this chapter as an alternative to an interlocal agreement must adopt the following terms and conditions by reference to this chapter in an ordinance or resolution:
  - (a) The city or town has adopted policies or regulations for receiving areas per attached ordinance(s) or resolution(s);
  - (b) Upon good faith consultation with the transferring county, and the county from within which the city is located, the city or town has designated receiving areas in the city or town within which transferable development rights or development rights credits may be used per attached ordinance(s) or resolution(s);
  - (c) Upon good faith consultation with the transferring county, and the county from within which the city is located, the city or town has adopted receiving area ratio or ratios for the transferable development rights or development rights credits to be received per attached ordinance(s) or resolution(s);
  - (d) The city or town, in consultation with the transferring county, and the county from within which the city is located, shall develop a process to notify the county when it has approved the use of transferable development rights or development rights credits in a specific project in the designated receiving area. For purposes of this chapter, "approved" occurs at the issuance of the first building permit for a project using development rights credits by the city or town's planning department; and
  - (e) The city or town shall work with the transferring county and the department to identify performance measures consistent with RCW 43.362.070 to report to the transferring county and the department.

- (2) Optional terms that a city or town may adopt verbatim or by reference are:
- (a) Upon good faith consultation with the transferring county, the city or town shall identify the sending areas from which the city or county agrees to accept transferable development rights.
  - (b) The city or town has estimated the capacity for development with transferable development rights (or development rights credits) from the transferring county per attached ordinance(s) or resolution(s).
  - (c) The city or town shall establish and operate a transfer of development rights bank to purchase, sell, and hold development rights.

#### NEW SECTION

#### **WAC 365-198-050 Terms and conditions for counties**

- (1) Counties that choose to use this chapter as an alternative to an interlocal agreement must adopt the following terms and conditions by reference to this chapter in an ordinance or resolution:
- (a) The county has adopted policies, regulations and administrative procedures to implement the regional transfer of development rights program, including but not limited to:
    - (i) Facilitating and promoting the qualification and certification of transferable development rights to eligible property owners for the sale of their transferable development rights from properties in the county's designated sending areas consistent with RCW 43.362.040;
    - (ii) Establishing procedures to facilitate the sale of transferable development rights or development rights credits; and
    - (iii) Establishing procedures to require, maintain, and enforce deed restrictions on a sending site from which transferable development rights or development rights credits are purchased in order to prohibit those sites from being developed in violation of deed restrictions.
  - (b) The county shall notify receiving cities and towns by December 31 of each year the number of available development rights credits remaining in designated sending areas.
    - (i) If the city or town, in consultation with the transferring county, has identified the sending area or areas from which it has agreed to accept transferable development rights the notification shall indicate the number of credits remaining in that sending area for the respective city or town.
    - (ii) If the county administers a transfer of development rights bank, annual notification of transactions shall be provided.

(2) Optional terms that a county may adopt by reference to this chapter in an ordinance or resolution:

- (a) The county shall establish and operate a transfer of development rights bank to purchase, sell, and hold development rights.
- (b) The county shall facilitate private transferable development rights transactions between willing sellers and buyers.

#### NEW SECTION

#### **WAC 365-198-060 Joint terms and conditions for counties, cities and towns**

Counties, cities, and towns that choose to use this chapter as an alternative to an interlocal agreement must adopt the following joint terms and conditions by reference to this chapter in an ordinance or resolution:

- (1) The county and city or town shall establish an evaluation and monitoring program based on quantitative and qualitative performance measures developed by the department for monitoring the regional transfer of development rights program under RCW 43.362.070.
- (2) The county and city or town shall enter into a dispute resolution process through mediation, with an agreed upon mediator and process, if agreement cannot be reached regarding interpretation or implementation of any terms and conditions in this chapter adopted by reference. The parties shall use the mediation process in good faith to attempt to come to agreement early in the process, and prior to any appeals or litigation that they might otherwise be entitled to bring.
- (3) The term and conditions in this chapter adopted by reference shall become effective on the effective date of the adopting ordinance or resolution.
- (4) The county, city or town may repeal the provisions of this chapter adopted by reference upon 90 days' written notice by the transferring county to the cities or towns or by cities and towns to the transferring county if:
  - (a) The city or town's development regulations allowing the use of development rights credits, or the provisions of the county's development regulations allowing transfer of development rights to cities are held invalid by any court of competent jurisdiction in a final judgment no longer subject to appeal; or
  - (b) The county, city or town materially defaults in the performance of the obligations as set forth in provisions of this chapter adopted verbatim or by reference, and fails to cure the default within thirty (30) days' of receipt of written notice from the county, city or town.
- (5) A city or town's repeal of the terms and conditions in this chapter adopted by reference shall not affect the use of development rights credits previously certified by the county. Development credits certified by the county prior to repeal by the city or town that have not

been used in the city or town's receiving area may be used in the county's or another city or town's designated receiving area.

- (6) The city or town shall indemnify and hold harmless the transferring county and its officers, agents and employees or any of them from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by reason or arising out of any negligent action or omission of the city or town, its officers, agents, and employees, or any of them, in performing obligations pursuant to this chapter. In the event that any suit based upon such a claim, action, loss, or damage is brought against the county, the city or town shall defend the same at its sole cost and expense, provided that the transferring county retains the right to participate in said suit if any principle of governmental or public law is involved; and if final judgment be rendered against the transferring county and its officers, agents, employees, or any of them, or jointly against the city or town and transferring county and their respective officers, agents, and employees or any of them, the city or town shall satisfy the same.
- (7) The transferring county shall indemnify and hold harmless the city or town and its officers, agents and employees, or any of them from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by reason or arising out of any negligent action or omission of the transferring county, its officers, agents, and employees, or any of them, in performing obligations pursuant to this chapter. In the event that any suit based upon such a claim, action, loss, or damage is brought against the city or town, the transferring county shall defend the same at its sole cost and expense, provided that the city or town retains the right to participate in said suit if any principle of governmental or public law is involved, and if final judgment be rendered against the city or town and its officers, agents, and employees, or any of them, or jointly against the city or town and county and their respective officers, agents, and employees, or any of them, the county shall satisfy the same.
- (8) The county and city or town acknowledge that if the claims, actions, suits, liability, loss, costs, expenses and damages referenced in subsections (6) and (7) of this section are caused by or result from the concurrent negligence of the city or town, its agents, employees, and/or officers and the county, its agents, employees, and/or officers, the provisions of this chapter adopted by reference shall be valid and enforceable only to the extent of the negligence of each party, its agents, employees and/or officers.

#### NEW SECTION

#### **WAC 365-198-070 Template for adopting terms and conditions**

The department shall provide an ordinance or resolution template for adopting terms and conditions verbatim by reference consistent with this chapter for use by counties, cities and towns participating in the regional transfer of development rights program.